PUBLIC PROSECUTOR v. MOHAMED ZAKI

[O.Cr. J. (Abdul Malek J.) March 9 to 14, July 1 & 2, and September 1, 1985]

[Kota Bharu — Criminal Trial No. 9 of 1983]

Criminal Law and Procedure — Trafficking in dangerous drug — Presumptions against the accused — Rebuttal — Balance of probabilities.

Dangerous Drugs — Trafficking in cannabis — Presumptions — Rebuttal — Balance of probabilities — Sentence of death — Dangerous Drugs Act, 1952, ss. 37(d), (da)(vi), 39B(1)(a) & 39B(2).

The accused was charged in trafficking a dangerous drug *viz.* 1,803 gm. of cannabis in contravention of section 39B(1) of the Dangerous Drugs Act, 1952, and punishable with death under section 39B(2) of the Act. The prosecution case rested mainly on the evidence of PW4 and PW6 who together with a police constable laid ambush at Pengkalan Haram Syed Daud on August 24, 1983. The accused was stopped on the river bank. He was carrying a bag containing a brown package with dried leaves which according to the Chemist Report contained 1,803 gm. of cannabis. He was arrested and brought to a police station, and he subsequently gave a cautioned statement. The crux of his defence was that he was asked by one An La to follow a motorcyclist he had brought along to the crossing point. The motorcyclist had then brought the accused to a boatman and a waiting boat in which the accused saw a bag. He was directed to bring this bag across and wait for An La on the other side.

Held: (1) the story of the accused in the light of the case for the prosecution was merely a fabrication calculated to pervert the course of justice. His version of how he was in possession of the dried leaves (P5) was purely a concoction inconsistent with his innocence;

(2) the accused had failed to rebut the presumptions raised by the prosecution on a balance of probabilities. He was therefore found guilty as charged and sentenced to death.

[*Editorial Note:* The accused filed his notice of appeal on July 9, 1985.]

[Cases cited: *Public Prosecutor* v. *Ibrahim bin Mastari* [1980] 2 M.L.J. 188; *Tan Too Kia* v. *Public Prosecutor* [1980] 2 M.L.J. 187; *Public Prosecutor* v. *Ng Goh Weng* [1979] 1 M.L.J. 127; *Poon Heong* v. *Public Prosecutor* [1949] M.L.J. 114; *Abdul Ghani Jusoh* v. *Public Prosecutor* [1981] 1 M.L.J. 25; *Syed Ali bin Syed Abdul Hamid* v. *Public Prosecutor* [1982] 1 M.L.J. 132; *Ho Seng Seng* v. *Rex* [1951] M.L.J. 225; *Chee Chiew Hiong* v. *Public Prosecutor* [1981] 2 M.L.J. 287; *Public Prosecutor* v. *Puteh Nordin* [1983] 2 M.L.J. 292; *Public Prosecutor* v. *Mohamed Ismail* [1984] 1 M.L.J. 134; *Lee Yong Wu* v. *Public Prosecutor* [1962] M.L.J. 351; *Public Prosecutor* v. *Govindan Kurup & 2 Ors.* [1947] M.L.J. 150; *Public Prosecutor* v. *Ang Boon Foo* [1981] 1 M.L.J. 40; *Neo Koon Cheon* v. *Reg.* [1959] M.L.J. 47; *Su Ah Ping* v. *Public Prosecutor* [1980] 1 M.L.J. 75; *Leow Nghee Lim* v. *Reg.* [1956] M.L.J. 28; *Public Prosecutor* v. *Tan Seow Chuan* [1985] 1 M.L.J. 318; *Tong Peng Hong* v. *Public Prosecutor* [1955] M.L.J. 232; *Mohd. Yusof bin Haji Ahmad* v. *Public Prosecutor* [1983] 2 M.L.J. 167; *Public Prosecutor* v. *Ramli bin Tulis* (Federal Territory Criminal Appeal 88/80) *Adil* April 1981 @ 17; *Toh Ah Loh and Mak Thim* v. *Rex* [1949] M.L.J. 54; *Public Prosecutor* v. *Nik Aziz bin Nik Ismail* (Kota Bharu Criminal Trial 1/84); *Public Prosecutor* v. *Cheng Meng Bong & Ors.* [1966] 1 M.L.J. 237.]

CRIMINAL TRIAL.

Mohamed Azman bin Husin (Deputy Public Prosecutor) for Public Prosecutor.

Wan Ismail bin Wan Ibrahim (assigned) for the accused.

Cur. Adv. Vult.

Abdul Malek J.: The following charge had been preferred against the accused:

"That you on August 24, 1983, at about 5.50 p.m., at Pengkalan Haram Syed Daud, Jeram Perdah, Rantau Panjang, in the District of Pasir Mas, in the State of Kelantan, did on your own behalf traffic in a dangerous drug, to wit 1,803 grammes of cannabis, and that you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act. No. 30 of 1952, punishable under section 39B(2) of the same Act."

The case for the prosecution rested mainly on the evidence of PC 94500 (PW4) and Lance Corporal 29169 (PW6) who together with PC 94536 had laid an ambush at Pengkalan Haram Syed Daud, Jeram Perdah at about 5.40 p.m. on August 24, 1983. While in ambush position, they had seen the accused crossing the river from the opposite Thai side to the Malaysian side in a boat paddled by another person. The accused had a green canvas bag on his right shoulder which, when it was examined by the police party when he was stopped later on the river bank, contained a brown package with dried leaves suspected to be ganja. According to PW4 and PW6, the boatman, who they could not identify, had by then crossed again to the Thai side. The accused was subsequently arrested and the exhibits brought back to the police station where PW4 lodged a police report to PW5. Both PW4 and PW6 testified that they did not smell alcohol on the accused at the time of arrest.

PW6 had then informed PW2, the investigating officer of the Anti Narcotics Division at Pasir Mas Police Station, of the arrest and PW2 had subsequently gone to the Jeram Perdah Police Station at about 7 p.m. to investigate. He had then taken the accused and the case exhibits back to Pasir Mas Police Station and informed PW8, the investigating officer in this case, of the matter. Later that night he and PW8 had then gone back

to Jeram Perdah Police Station to conduct further investigations. On PW8's instructions, PW3 had taken photographs of the scene and the case exhibits on the following day. In his investigations, PW8 had managed to trace one of the boatmen (Hamzah bin Yusof) plying the river but he was of no assistance as he could not identify the accused and he himself was not identified by PW4 and PW6.

The dried leaves (P5) were later sent to the Chemistry Department Kuala Trengganu by PW2 for analysis and found to contain 1,803 grammes of cannabis as per Chemist Report P6. A cautioned statement was recorded from the accused by PW7 on August 25, 1983 at about 10.30 a.m. According to PW7, he did so on the instructions of PW8.

It is now necessary to review the prosecution evidence. Having seen and heard PW4 and PW6, they impressed the Court as being honest and truthful witnesses and I saw no reason to disbelieve them. They also corroborated one another on all material details.

As regards the testimony of the Chemist (PW1), he gave evidence that the 661 branches he found in P5 were divided into 70 sections and from each section he took a sampling for analysis. He stated that all the 70 sections were visually similar in all aspects indicating that they were of the same nature and description and although he admitted that he did not weigh the 70 samplings, I was satisfied that having taken samplings of 70 sections which was more than ten percent of 661 branches, he had in fact complied with the requirement stipulated in section 37(j) of the Dangerous Drugs Act 1952 although in this case the cannabis was only in one package but divided into sections and not in a number of receptacles as stated in that paragraph. As regards the weighing, it is pertinent to note that it is the practice accepted by the Courts during chemical analysis in such cases not to weigh the actual drugs but to weigh the drugs with its container and to ascertain the weight of the drugs by deducting from the total weight the weight of the container. Consequently I held that P5 actually contained 1,803 grammes of cannabis as stated in the Chemist Report. As regards the break of the chain of evidence as regards P5, I held that there was no merit to this submission as I was satisfied that it had passed without any tampering from PW6 to PW2 and then to PW8 who had then sealed it for PW2 to send it to, and fetch it from, PW1 under seal.

The evidence of PW2 merits special mention. At the earlier part of his testimony, the Court had in fact reprimanded him for constantly referring to his investigation diary while giving evidence and in the course of his evidence, he had in fact admitted that he was a forgetful person. In the result he gave contradictory evidence as to when he brought the accused and the exhibits back to Pasir Mas Police Station from Jeram Perdah Police Station. In his examination in chief he had stated that from Jeram Perdah Police Station he had returned to Pasir Mas Police Station and handed over the exhibits to PW8 at 10.10 p.m. the same night. However under cross-examination he testified that when he returned from Jeram Perdah Police Station the first time at 8.30 p.m. he did not bring back the accused and the exhibits to Pasir Mas Police Station which he only did when he returned the second time with PW8 at 11.40 p.m. After the trial within a trial PW2 was recalled to clarify this contradiction and he gave evidence that he did in fact go to Jeram Perdah Police Station twice on the date in question and had in fact brought the accused and the exhibits back to Pasir Mas Police Station on his first return upon which he had handed them over to PW8. He had then gone again to Jeram Perdah Police Station with PW8 that same night.

Having seen and heard PW2, I accepted his explanation since he himself had admitted that he was forgetful and the fact relating to this contradiction had not been recorded in his diary. The version given in his explanation tallied with the evidence of PW6 and PW8 on this point and I held that he had in fact brought the accused and the exhibits back to Pasir Mas Police Station the first time he returned from Jeram Perdah Police Station that night.

As regards the trial within a trial to determine the admissibility of the cautioned statement (ID18) recorded from the accused on August 25 at 10.30 a.m. by PW7 (TPW1) the accused had in fact testified that he did not see TPW1 at all for the recording of the cautioned statement and his statement, which was not voluntary, was recorded by four other persons including TPW2 while he was being handcuffed to a chair. In the circumstances I did not accept his evidence to this effect as the allegation was not substantiated, and accepted the testimony of TPW1 as regards the recording of the cautioned statement. However, I was of the view after hearing and seeing all the witnesses for the trial within a trial that the cau-

tion was not properly administered and that the statement was not made in a language where both the recording officer and the accused fully understood one another. TPW1 had given evidence that he could not remember if he had the relevant law with him as regards the caution and had read the caution in its translated version from the copy given by the prosecuting officer of the Pasir Mas Magistrate's Court. He also testified that he rendered the caution to the accused in the Kelantanese dialect which he had modified from the translated version received. As regards the statement itself, TPW1 stated that he added his own words as he went along and changed the words of the accused in the Kelantanese dialect into standard Bahasa Malaysia. Considering the fact that the accused had been schooling in Surin, Thailand and had been speaking Thai until 1981 when he came to Kota Bharu, I held that he was not that conversant in the Malay language although he may have been able to converse in the Kelantanese dialect to some extent. TPW1 too had told the Court that he was not Kelantanese and having served eight years in Kelantan was able to understand the dialect but was not that conversant with it. Since the final version of the cautioned statement was not the exact words of the accused as stated by TPW1 and in view of the different language backgrounds of both the recording officer and the accused, I was not satisfied that they both fully understood one another during the recording and held that the caution was not properly administered to the accused and that the cautioned statement was not what the accused had actually said but the presentation of the recording officer himself from what he thought the accused said. In consequence I came to the conclusion that it was not admissible in evidence.

At the end of the case for the prosecution, I was of the considered opinion that the prosecution had raised the presumptions under section 37(d) and (da)(vi) of the Dangerous Drugs Act 1952 as I had earlier accepted the testimony of PW4 and PW6 that the bag containing the 1,803 grammes of cannabis was actually found in the possession of the accused on the relevant date and at the relevant time. He therefore had the custody and control of P5 and was deemed, until the contrary was proved, to be in possession of the drugs in question and to know the nature of such drugs. I accordingly called upon the defence to answer the charge.

The accused elected to give evidence on oath. He told the Court that he had gone to visit his mother for the Hari Raya holidays. He had decided to return to Malaysia on August 24, 1983 at 7 a.m. via Golok and not via his normal route Ta'bai as he had no identity card and was in fact a refugee wanted by the Thai police and military authorities as a result of having deserted the Thai national service after a quarrel with his commander.

While at Golok from 9 a.m. he had gone to visit a friend Hassan bin Dollah who lived on the outskirts of the town but did not stay for lunch. He had then gone to a Chinese restaurant for lunch at about 2 p.m. where he had by chance met his brother Seman's friend by the name of An La and three others. An La had asked him where he was going and on being told by the accused that he was returning to Kota Bharu, had said that he could go back with the group later in the afternoon as the distance was near. The lunch went on till 4 p.m. and they consumed Mei Kong liquor during and after the food. An La and the group then left and An La returned alone in a white Datsun and told the accused to ride pillion on a motorcycle which he had brought along to go to a crossing point by the river. The motorcyclist took the accused to the riverside and asked him to board a boat which was waiting there with the boatman.

The accused gave evidence further that the bag similar to P8 was already in the boat when he got onto it and the motorcyclist told him to deliver it to An La and his group who would be on the Malaysian side. After the boat reached the Malaysian side, the accused said he paid the boatman the 30 sen fare and the boatman promptly left. He walked up to a coffeeshop but was not allowed to enter as the owner was then closing it. He then waited for a car to come by the roadside for half an hour. Instead a motorcycle with two men on it came and asked him for his identity card and about the bag. He identified the two men as PC 94536 and PW4. The two men opened the bag and told the accused it contained ganja. The accused also told the Court that he thought he was being arrested for not having an identity card and this was not the first time this had taken place. The accused was not successful in subpoenaing his witnesses despite several adjournments and managed to call only his mother (DW2) as witness.

It is now necessary to review the defence evidence. DW2 impressed the Court as being an honest and truthful witness and the Court believed her. She corroborated the accused's testimony on a number of details including the fact that he was schooling in Surin, Thailand while staying with his brother Seman, that the family lived in Narathi-

wat, that the accused worked in Kota Bharu since 1981, that the accused had a drinking habit, that the accused was a labourer and had no means as he used to ask her for money as on the day in question, that the accused had a friend Hassan bin Dollah living in Golok, that the accused had told her he was returning via Golok and not Ta'bai as he was evading the Thai authorities and that he had left her house that morning without any luggage. But that was as far as her corroboration went.

The crux of the accused's defence came later. He said he had had this chance encounter with An La and his friends in a Chinese restaurant at around lunchtime. He had then decided not to go back alone as An La had told him to go back with the group later in the evening. At around 4 p.m. the group left him alone in the restaurant. He was not bothered with this as he was quite in an intoxicated state due to the Mei Kong liquor. An La then returned to the restaurant alone in a white Datsun and asked the accused to follow the motorcyclist he had brought along to the crossing point. The motorcyclist had then brought the accused to a waiting boat and boatman in which boat the accused saw a bag. He was directed to bring this bag across and wait for An La on the other side.

Now, is this the action of someone who was taking pains to avoid the authorities as he had no valid travel documents and was in fact a refugee? His sole intention would be to cross to the Malaysian side as quickly as possible without being detected. Yet he chose first to pay a visit to a friend living in the outskirts of Golok for a few hours. Then instead of lunching with that friend in the privacy of his house, he turned down his friend's invitation and had lunch alone in a Chinese restaurant.

When An La told him to go back with his group, he felt it was safer as he did not have any passport or permit. Then he proceeded to intoxicate himself with liquor. When the group left the restaurant, he should have been worried that they were leaving him but he explained he was not as he was under the influence of drink. When An La returned half an hour later he was still not concerned that he was not asked to go with An La in his empty white Datsun as earlier promised but to follow an unknown motorcyclist to a boat at the river. Would this be a reaction consistent with a person who had earlier felt it was safer to return to Malaysia in a group rather than alone? Then when the motorcyclist told him to bring the bag in the boat to An La's group on the Malaysian side, he did so without the slightest curiosity or concern as to what he was doing.

Having seen and heard the accused, the Court was of the considered view that his story in the light of the case for the prosecution was merely a fabrication calculated to pervert the course of justice and I held that his version of how he was in possession of P5 was purely a concoction inconsistent with his innocence. His evidence, in the Court's mind, had failed to rebut the presumptions raised by the prosecution on a balance of probabilities and I therefore found him guilty as charged and sentenced him to death.

Convicted and sentenced accordingly.

Solicitors: *Mahmood Adam, Wan Ismail & Co.*

PUBLIC PROSECUTOR v. MOHAMED ZAIRI BIN ABU BAKAR & ANOR.

[R.Cr. J. (Wan Yahya J.) November 4, 1985]

[Malacca – Criminal Revision Nos. 2 & 3 of 1985]

Juveniles – Escape from boys' home – Arrest – Order for temporary detention – Whether Magistrate sitting alone constitutes Juvenile Court – Registrar's Circular No. 10 of 1978 – Juvenile Courts Act 1947, ss. 3, 4 & 32.

The two accused, both juveniles, escaped from Rumah Budak Laki-Laki Tun Abdul Aziz, Melaka. They were arrested three days later and produced before the Magistrate. The learned Magistrate made orders for their temporary detention at the Asrama Bukit Baru and a month later he proceeded to hear the matter, sitting alone without the aid of advisers. He ordered the 1st accused to be committed to the Henry Gurney School and the other to Sekolah Tunas Bakti.

Held: (1) it is evident from the language employed in section 32 of the Juvenile Courts Act as well as the learned Registrar's circular that the juvenile apprehended for escaping from the approved school is to be taken before a Juvenile Court for an order to be made under section 32(1)(i), (ii) and (2). The constitution and functions of a Juvenile Court are spelt out in section 4 of the Act. The Magistrate sitting alone cannot constitute a Juvenile Court for the purposes of section 32;

(2) the committal orders made by the learned Magistrate were not made in accordance with the provisions of the Act and must therefore be quashed.